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March 16, 2010

**DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS**

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: October 14, 2009

Case Number: TSO-0837

This Decision considers the eligibility of XXXXXXXX XXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."¹ As explained below, it is my decision that the individual should not be granted an access authorization.²

I. BACKGROUND

The individual has worked for a Department of Energy (DOE) contractor since November 2008. The individual's employer requested that he be granted an access authorization and, in January 2009, the individual submitted a Questionnaire for National Security Positions (the 2009 QNSP) to the DOE. An Office of Personnel Management investigator conducted a Personal Subject Interview with the

¹ Decisions issued by the Office of Hearings and Appeals (OHA), with names and other personal identifying information deleted, are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine at <http://www.oha.doe.gov/search.htm>.

² Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

individual in March 2009 (the 2009 PRSI). Based on information that the individual reported on his 2009 QNSP and at the 2009 PRSI, the Local Security Office (LSO) conducted a Personnel Security Interview with the individual in June 2009 (the 2009 PSI).

In August 2009, the LSO issued a Notification Letter to the individual, together with a statement setting forth the information that created a substantial doubt about the individual's eligibility to hold a DOE security clearance (Enclosure 2). In Enclosure 2, the LSO alleges that the individual's behavior has raised a security concern under 10 C.F.R. § 710.8(l) of the regulations governing eligibility for access to classified material (Criterion L) because the following information indicates that he has engaged in unusual conduct or is subject to circumstances indicating that he is not honest, reliable or trustworthy, or that he may be subject to pressure, coercion, exploitation or duress:

1. The individual admitted that he has not filed his Federal income taxes for tax years 2000, and 2004 through 2007, and that he attributed his lack of filing to being complacent and lazy;
2. The individual admitted that he has been aware of his 2002 tax bill since 2003, but has taken no action to pay it; and
3. The individual acknowledged that he has not paid an IRS tax lien for tax years 2002 and 2003 that has increased from \$5,543.80 to approximately \$8,000.

Enclosure 2 of Notification Letter, citing 2009 PSI at pp. 40-66.³

The individual requested a hearing (hereinafter "the hearing") to respond to the concerns raised in the Notification Letter. On October 5, 2009, the Office of Hearings and Appeals Director appointed me the Hearing Officer in this case. At the hearing I convened in this matter in January 2010, I received testimony from three persons: the individual, his Certified Public Account (CPA), and the individual's union leader/co-worker.

II. APPLICABLE STANDARDS

A DOE administrative review proceeding under this Part is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a presumption against granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests

³ At the January 2010 hearing, the individual testified that he also had not yet filed his 2008 income tax return. Hearing Transcript (TR) at 19-20.

of national security test" for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. *Personnel Security Hearing*, Case No. VSO-0002 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. *Personnel Security Hearing*, Case No. VSO-0005 (1995), *aff'd*, Case No. VSA-0005 (1995). *See also* 10 C.F.R. § 710.7(c).

III. FINDINGS OF FACT AND ANALYSIS

The individual admits that he failed to file his federal tax returns over a period of several years, and that he did not pay or otherwise resolve an outstanding tax liability from 2003 totaling several thousand dollars. *See* Individual's September 2009 hearing request, Hearing Transcript (TR) at 18-19, 29. This is unquestionably a "pattern of financial irresponsibility," which Criterion L specifies can be "unusual conduct. . . tend[ing] to show that the individual is not honest, reliable or trustworthy. . . ." 10 C.F.R. § 708.8(l). At the hearing, the individual explained why he had failed to file income tax returns for several years, and why he did not pay a tax liability arising from his 2003 tax return. The individual and his CPA also testified about how they are working together to resolve these issues. As discussed below, I find that the individual has not demonstrated that he has acted responsibly concerning tax issues in the past, and that his current efforts, while positive, have not yet mitigated these Criterion L concerns.

A. The Individual's Explanation for Failing to File Income Tax Returns

In his September 2009 hearing request, the individual stated that he "left tax issues to my spouse." He stated that he had described himself as "complacent" at his 2009 PSI because he should not have relied on his wife, but should have made certain that his tax returns were filed. At a pre-hearing conference call in this proceeding, I suggested that the individual should consider having his wife testify concerning their family's financial arrangements, and the misunderstanding that resulted in his unfiled tax returns for tax years 2000 and 2004 through 2007. *See* December 21, 2009, email summarizing the contents of the conference call. The individual agreed to present his wife's testimony. However, at the hearing, he testified that he had been unable to persuade her to testify concerning these issues. He stated that she reviewed the documents provided to the individual by the LSO and told him that she knew nothing about it, and that she "didn't want to seem like she is at fault." TR at 14.

The individual testified that he has been married since 1998, and that he and his wife decided early in their marriage not to try to maintain a joint checking or savings accounts. He stated that there are bills that he pays, and bills that she pays, and they both contribute to purchases for their children. TR at 39-42. He stated that his wife would remind him about bills that he needed to pay, such as the mortgage, and that he got "lazy and dependent" and relied on her to oversee their finances. He stated that she told him that she was going to a tax preparer to "pay taxes," and that he assumed that she

was submitting a joint return. TR at 46. He stated that they have a basket at their house where he would deposit all of the household bills as well as all of the tax information that he received from his employer or his mortgage company. He testified that he assumed that his wife was taking care of the tax information as well as paying the bills. TR at 48. When he learned in early 2009 that his taxes for several years had not been filed, he asked her about it and she told him that he never told her to file a joint tax return, and that she thought that he was taking care of his own tax filings. TR at 46.

I am not convinced that the individual believed that his wife was including him on a joint income tax return for tax year 2000 and tax years 2004 through 2008. As an initial matter, I find that the refusal of the individual's wife to testify on this issue and to corroborate the individual's account of their financial arrangements raises the concern that the individual is not providing an accurate description of their interactions on these issues in his own testimony. In addition, there is no evidence in the record that the individual and his wife ever filed a joint income tax return. In fact, the individual testified that, during his marriage, he filed individual tax returns with the IRS for tax years 2001, 2002 and 2003, using a tax preparer in two of those years. TR at 19, 32-33. I cannot accept the individual's assertion that he reasonably believed that his wife was filing a joint return when he states that they never specifically discussed filing such a return and when he filed an individual return for three of the years in which they were married. At best, the individual made an unreasonable assumption about the filing of these tax returns that indicates a reckless disregard for his financial obligation to pay taxes and file returns.

B. The Individual's Explanation for his Unpaid 2002 and 2003 Income Tax Liabilities

The individual testified that the IRS found that he had claimed too many exemptions on his 2002 tax return, and had received an excessive tax refund that it wanted him to repay. With respect to his 2003 tax return, the IRS found that he claimed two children as dependents who also were being claimed as dependents by someone else. The individual explained that some friends were out of work and that he housed and supported their two oldest children for eight months. He stated that the friends suggested that he list the children as dependents on his income tax return because he had supported them during that time. However, the children's grandmother also listed the children as dependents, so the IRS rejected his claim and directed him to pay additional tax. He stated that he has not paid any of these additional tax amounts, and that, with interest and penalties, the total amount for 2002 and 2003 is now approximately \$8,000. TR at 26-29.

C. The Individual's Efforts to Resolve His Tax Issues

The individual stated that in 2005, he went to a tax preparation and tax problem solving service (the Tax Service) and entered into an agreement for them to work with the IRS to resolve the disputed tax claims. However, he stated that he became unemployed for several months in 2005, and was unable to continue paying the Tax Service to work on the matter. He stated that he returned to the Tax Service in 2009, after his OPM security clearance investigation revealed the \$8,000 IRS tax lien. He stated that his CPA, who is employed by the Tax Service, has obtained a deferment of his unpaid IRS obligation while the Tax Service and the IRS negotiate a settlement amount. TR at 29-32.

The CPA testified that she first spoke to the individual by telephone in September 2005 concerning his 2002 and 2003 tax issues, and attempted unsuccessfully to contact him later in 2005 and in 2006. In June 2006, she sent the individual a letter saying that the Tax Service could not do anything else for him without specific documentation concerning money that he spent to support the dependents he claimed in the 2002 and 2003 tax years. TR at 68-69. She stated that she next was contacted by the individual in June 2009, and that since then she has been working with him to resolve his outstanding tax liability and to submit his unfiled tax returns. She stated that the Tax Service plans to submit amended returns for tax years 2002 and 2003 that should lower the individual's liability for those years. She testified that she has been working to complete the individual's unfiled returns for tax years 2004 through 2007, and would soon provide returns for the individual to submit to the IRS. She first became aware during the hearing that the individual wanted her to submit tax returns for the years 2000 and 2008, but she indicated that she could complete them. TR at 70-75, 81. The CPA testified that she could not yet provide an estimate of the individual's final tax bill, but that she was certain that it would not be less than \$5,000. She stated that she believed that the individual would be able to set up an installment agreement with the IRS to make monthly payments to pay off his tax bill. TR at 75-77.

In a January 21, 2010, post-hearing filing, the individual provided copies of the first pages of tax returns stamped "received" on that date by the IRS, indicating that he now has submitted his income taxes for the year 2000, and for the years 2004 through 2008. The individual also submitted a January 19, 2010, letter from the CPA which states that his total tax due for 2004 through 2007, less a \$635 overpayment in 2008, is \$16,029. In her letter, the CPA stated that this amount does not include penalties and interest. In a note attached to this submission, the individual states that the Tax Service will now "start on the compromise part [with the IRS] which will bring the total down tremendously." See Individual's January 21, 2010 facsimile submissions.

D. The Individual's Explanations and Tax Filings Do Not Mitigate the DOE's Concerns

As stated above, the individual did not file federal income tax returns for the years 2000 and for the years 2004 through 2008 until January 21, 2010, and he has an unpaid tax liability for the years 2004 through 2008, exclusive of penalties and interest, of approximately \$16,029. As discussed above, I find that there is insufficient evidence to support the individual's assertion that he believed that his spouse had filed joint returns for those years. Accordingly, I am left to conclude that the individual failed to pay the full amount of his taxes and to file tax returns for several years based on his admitted complacency and procrastination.

In addition, he has not paid approximately \$8,000 in tax liability, penalties and interest arising from his 2002 and 2003 tax returns. The individual admits that he was aware of these tax liabilities no later than 2005 when he first contacted the Tax Service. However, he also admits that he dropped his efforts to resolve those liabilities when he was unemployed for several months in 2005, and did not resume working with the Tax Service on that issue until June 2009. There comes a point where complacency and procrastination in financial matters becomes a reckless disregard for basic financial and social obligations. I find that the individual's procrastination and apparent indifference in failing to resolve his 2002 and 2003 income tax liability issues and in failing to file federal tax

returns for several years raises serious concerns about his reliability. *See Personnel Security Review*, Case No. TSO-0457 (2007).⁴

The individual contends that by working with the Tax Service to file his delinquent tax returns, and by authorizing the Tax Service to negotiate a settlement of his outstanding tax liability with the IRS, he has resolved the Criterion L concerns arising from his previous failures to address these issues. I agree that those actions are positive steps towards mitigating the Criterion L concerns. *See* Adjudicative Guidelines, Guideline F, Paragraph 20(c) and (d). However, in this instance, I find that they are insufficient to mitigate the LSO's concerns. Although the individual has now filed the delinquent returns, he certainly has not demonstrated a sustained period of reliability with respect to tax issues from which I am able to conclude that the Criterion L security concerns have been resolved.⁵ *See Personnel Security Review*, Case No. VSA-0300 (2000), *see also* Adjudicative Guidelines, Guideline F, Paragraph 20(a). In this instance, the individual's recent tax filings have resulted in very substantial tax liability to the IRS, and his \$8,000 in IRS liability from his 2002 and 2003 tax returns remains unpaid. It remains to be seen whether the individual will enter into a payment agreement with the IRS and will abide by the terms of that agreement. *Cf. Personnel Security Hearing*, Case No. TSO-0798 (2010) (Hearing Officer restores an individual's access authorization after finding that the individual is now up-to-date on his tax filings, with no taxes owed and no penalties assessed, and that he had acted responsibly by filing for extensions each year with the IRS).

Accordingly, I find that the individual has not yet resolved his tax issues and has not yet demonstrated a sustained period of financial reliability concerning his tax obligations to the extent necessary to resolve the LSO's security concerns. I therefore conclude that it would not be appropriate to grant the individual an access authorization.

IV. CONCLUSION

For the reasons set forth above, I find that the LSO properly found that the individual's behavior raised Criterion L concerns regarding his financial irresponsibility. Further, I find that this derogatory information under Criterion L has not been mitigated sufficiently at this time. Accordingly, after considering all of the relevant information, favorable or unfavorable, in a comprehensive and common-sense manner, I conclude that the individual has not yet demonstrated

⁴ *See, also*, Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Adjudicative Guidelines), Guideline F, Paragraph 19(d) and (g) at <http://www.archives.gov/isoo/pdf/hadley-adjudicative-guidelines.pdf> (December 29, 2005)

⁵ At the hearing, the individual's union leader/co-worker testified that since the individual began his present employment in November 2008, he has performed his work assignments in a reliable and professional manner. TR at 87-89. I accord only neutral weight to this testimony as it is insufficient to overcome the security concerns associated with the individual's long-term, serious pattern of failing to fulfill his federal tax obligations.

that granting him an access authorization would not endanger the common defense and would be clearly consistent with the national interest. The individual or the DOE may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: March 16, 2010